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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

NO. 92-7507

EVERETT LEE MUELLER

Petitioner,

v.

COMMONWEALTH OF VIRGINIA

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER PETITIONER'S ATTACK UPON HIS CONFESSION ADVANCES LITTLE MORE THAN A STATE LAW, FACT-SPECIFIC ARGUMENT AND THEREFORE FAILS TO PRESENT A SUBSTANTIAL FEDERAL CONSTITUTIONAL QUESTION?

II. WHETHER PETITIONER'S ARGUMENTS ON THE MERITS CONCERNING HIS CONFESSION AND THE VOIR DIRE ARE TOO INSUBSTANTIAL TO WARRANT REVIEW BY THIS COURT?

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OPINION BELOW

The opinion of the Supreme Court of Virginia is reported at 244 Va. 386, 422 S.E.2d 380 (1992).

JURISDICTION

The petitioner does not assert the basis for this Court's jurisdiction in his petition.

CONSTITUTIONAL PROVISIONS INVOLVED

The relevant constitutional provisions involved are recited in the petition at 2.

STATEMENT OF THE CASE

Petitioner was convicted by a jury in the Circuit Court of Chesterfield County, Virginia, on September 11, 1991 of capital murder in the commission of, or subsequent to, rape and in the commission of abduction with intent to defile Charity Powers. On September 12, 1991, Mueller was sentenced to death on the capital murder conviction. In addition, petitioner was convicted of abduction and rape and was sentenced to two terms in the penitentiary of life imprisonment. Thereafter, on December 19, 1991, the trial court sentenced petitioner in accordance with the verdict of the jury.

Petitioner then appealed his convictions to the Supreme Court of Virginia. On April 1, 1992, the State Supreme Court consolidated Mueller's appeal on the underlying offenses with his capital murder appeal. In a published opinion, the Supreme Court of Virginia affirmed in all respects. Mueller v. Commonwealth, 244 Va. 386, 422 S.E.2d 380 (1992).

STATEMENT OF FACTS

After her mother dropped her off at a skating rink in Chesterfield County on the night of October 5, 1990, Charity Powers, who was ten years old, disappeared in the early morning hours of October 6. Her body was recovered in a shallow grave on February 10, 1991, and petitioner was arrested two days later. Mueller then confessed to the capital murder, rape, and abduction of Powers.

A. Suppression Hearing

At the suppression hearing, the Commonwealth introduced evidence that Powers had last been seen after midnight on October 6, 1990 at a fast food restaurant located 1/4 of a mile from the skating rink. (App. 117-118).[1] Witnesses at the restaurant observed a man who resembled Mueller watching Charity as she sat outside the restaurant. (App. 120-121).

The Commonwealth's evidence also showed that Mueller, who was 42 years old, was no novice in the criminal justice system. He had been arrested three times on criminal charges in the 1970s; each time petitioner had been advised of his Miranda rights and, after signing a waiver form, had given a statement to the police. (App. 253-257, 269-275). Moreover, on October 9, 1990, Detectives Wayne Garber and G. F. Paul, III of the Chesterfield County Police Department each advised petitioner of his Miranda rights. Mueller then executed a waiver form and agreed to take a polygraph examination. Mueller indicated that he understood his rights and that he had a G.E.D. (App. 153, 184-185, 279-282). After Paul asked Mueller to sign a consent form for the search of his vehicle, however, Mueller stated that he wanted to talk with a lawyer before he took the polygraph examination and wanted to be present during the search of his car. (App. 188, 283). Mueller then stood up and

[1]References to the appendix in the direct appeal in the Supreme Court of Virginia will be designated as "App.___." Further, the facts relevant to the present petition are recited in the opinion of the Supreme Court of Virginia on direct appeal. Mueller v. Commonwealth, 244 Va. at 389-392, 422 S.E.2d at 383-385.

ended the examination. (App. 188).[2]

On October 22, 1990, petitioner again unequivocally ended an interview after stating that he wanted to leave and then standing up. (App. 190-191, 220). Subsequently, petitioner only mentioned an attorney once before his arrest. On November 5, 1990, Mueller stated that he would contact counsel to determine if the police "were setting him up." (App. 224). The police asked Mueller at least four times to obtain counsel and get back with them; Mueller said several times that he was attempting to retain one, but he never did and no lawyer ever called the police. (App. 193, 227-234).

Detective Garber and John Palfi, an FBI special agent, were the two primary investigators in the Powers case. They questioned Mueller more than a dozen times in the four months prior to his arrest. (App. 150-151, 191-192, 221-231). Mueller, who twice drove to the police department to be interviewed, was questioned in a variety of locations. (App. 184-185, 189-190, 219). As a result of their frequent contacts, the police developed a cordial relationship with Mueller. (App. 193). In fact, when the officers were late in calling on him, petitioner sometimes stated that he had been looking for them and had wondered where they were. (App. 194). At the end of some interviews, Mueller indicated that he wanted to speak with the police further. (App. 235).

The police recovered Charity's body on February 10, 1991, at

[2]Later, on February 7, 1991, petitioner unambiguously refused to take a polygraph test. (App. 237).

a site about 900 feet behind Mueller's home and less than a mile from the skating rink and fast food restaurant. (App. 1018, 1051-1056). Garber and Palfi subsequently arrested Mueller on the morning of February 12, 1991 and took him to the Chesterfield County Police Department where they interrogated him for approximately 4-1/2 hours. (App. 149-150). At the outset of the questioning, Garber again advised Mueller of his Miranda rights and he agreed to talk to him and Palfi. (App. 151-153, 195-196, 1345-1346). Neither officer noticed any physical or mental condition indicating that Mueller was not in full control of his faculties. (App. 198-240). The police provided Mueller with water and cigarettes and never refused him anything that he requested. (App. 198).

During the first two hours of the interrogation, Mueller several times stated that he was ready to go to jail or that the police should take him to jail or put him in jail. (App. 157-158, 170, 180-181, 212-213, 217-218). At no point prior to confessing, though, did Mueller say that he wished to end the questioning. If he had, that "would have been the end" of the interrogation. (App. 157). When the officers asked petitioner if he no longer wanted to talk to them, Mueller said he did not want to speak with anyone else but did wish to talk to them. (App. 158, 180-182).

Neither officer construed his comments to mean that petitioner wished to stop the interrogation. Rather, especially in view of the fact that at the beginning of the interview petitioner had discussed where and under what circumstances he was going to jail,

the officers viewed these comments as an attempt to avoid confessing, which they believed he was about to do. (App. 157, 181, 213). Each officer had previously interrogated other defendants who had similarly referred to going to jail and who had the same intent of forestalling a confession. (App. 171, 216).

After about two hours, Palfi left the room. Several minutes later, Mueller asked Garber whether he thought he needed an attorney. (App. 153-154). This was Mueller's sole reference to an attorney during the interrogation. (App. 199). At this point, Garber believed that Mueller wanted to give a statement but also wanted to ensure that an attorney did not have to be present when he gave it. (App. 155, 199-200). Thus, Garber did not construe petitioner's question as a request for counsel. (App. 209).

The officer responded to Mueller's question by shrugging his shoulders and stating: "We are talking." (App. 154, 179). While Garber did not recall shaking his head as he responded, he testified that if he had also done this his response was aimed at telling petitioner that he could not advise him on this matter, not that an attorney was unnecessary. (App. 155-156, 178-179, 200).

Several minutes after this exchange, Mueller told Garber to bring Palfi back into the room. He then shook each officer's hand, congratulated them for their job, and stated that they had the right man. (App. 201-202). This was the same kind of "unambiguous conduct" which the officers had seen when Mueller stopped the two interviews in October. (App. 202). It was, however, unlike petitioner's previous conduct during the post-arrest interrogation.

(App. 200-201, 241-242). Mueller then confessed to the abduction, rape, and murder of Charity Powers. (App. 202). Petitioner told the officers that he had talked because "it was eating at him. It was driving him crazy, and he had not been able to get any sleep." (App. 201, 244).

The trial court, in denying petitioner's motion to suppress his confession, found as fact that: petitioner knew how to ask for the assistance of counsel and had done so on October 9, 1990; Mueller was advised at the outset of the interview on February 12, 1991 of his Miranda rights and understood them; his ability to exercise his free will to invoke his rights was not thereafter overborne; petitioner's reference to an attorney in his question to Garber was not an expression of his desire for the assistance of counsel; and petitioner had been advised of and understood his Miranda rights before his arrest. (App. 71-75).

B. The Guilt Phase

The Commonwealth's evidence established that as a result of their ongoing investigation, the police began to search for Charity's body near Mueller's home in February, 1991. On February 8, searchers uncovered Charity's remains in a wooded area near Mueller's home. (App. 1017-1018, 1023-1027). The police then recovered a knife about 174 feet from Charity's grave as well as a hole about 120 feet from the burial site. (App. 1029-1033, 1048).

The prosecution also introduced Mueller's confession, in which he stated that he had offered Powers a ride home from the restaurant. Petitioner, however, then drove her to his home and

took her into the woods where he had intercourse with her. He admitted having had a knife nearby, but asserted that he had not used it. Because Mueller was concerned that Charity would turn him in, he said that he then strangled her to death. The next morning, petitioner tried to dig a grave in one place, and then buried Powers a few feet away near a pond.

The prosecution also adduced evidence that after confessing, Mueller helped the police to locate the clothing and personal effects of Charity which he had burned. Without Mueller's help, the police "would never have found" these items because the area was a dumping ground. (App. 1080). Mueller also showed them the location where he had lost his knife; it was in the same area where the knife had been found. (App. 1082). Petitioner also indicated that the place where the knife had been recovered was about 15 feet from where Mueller had intercourse with Powers. (App. 1083).

Finally, the Commonwealth introduced forensic evidence establishing the identity of the body as Charity. (App. 1097-1112). Concerning the cause of death, the medical examiner testified that "irregular holes in the area where each nipple would be" had been found and opined that these were injuries. (App. 1139, 1141). The medical examiner further testified that there was disproportionately greater decomposition in Charity's neck area, thus indicating that she had probably suffered a neck injury. (1146-1147). Finally, the examiner testified that the cause of death was "acute neck injury" and that Charity had bled before her death. (App. 1147-1153, 1160-1166).

C. The Penalty Phase

The Commonwealth introduced evidence detailing Mueller's long history of abductions and sexual assaults at knifepoint, including the rape of petitioner's own sister. (App. 1184-1221). Both parties also introduced expert testimony by clinical psychologists; each expert agreed that petitioner suffered from a "severe" or "pervasive life-long" anti-social personality disorder. (App. 1226-1229, 1273). Finally, testifying in his own behalf, petitioner acknowledged that he had not felt remorse after raping several women and conceded that after one victim had finished testifying in this case, he had called her "a lying bitch." (App. 1305-1307). Mueller also asserted that he had confessed to the capital murder charge only to help his girlfriend get off from a drunk driving charge. (App. 1323-1324).

REASONS FOR DENYING THE WRIT

I. Petitioner's Argument Attacking The Admissibility Of His Confession Raises Little More Than A State Law, Fact-Specific Claim And Thus Does Not Present A Substantial Federal Constitutional Question.

Petitioner challenges his confession, based on the failure of the police to cease questioning after he referred several times about being ready to go to jail and then asked Detective Garber if he needed an attorney. That is, Mueller asserts that he invoked his right to silence and the officers thereby committed a Miranda violation by continuing the interrogation. Further, petitioner contends that he would have requested counsel but for Garber's

reply and that the officer effectively undercut the Miranda warnings he had previously given.

Mueller's argument, though ultimately couched in constitutional terms, in large measure raises nothing more than a state law claim, resolution of which is merely dependent upon the facts in this case. That is, petitioner acknowledges the "bright line" test in Virginia, which requires a suspect to unambiguously invoke his right to counsel or right to remain silent, but says that Garber's response dissuaded Mueller from making such an unambiguous request. (Pet. at 14). The very fact that the present petition is almost entirely devoted to distinguishing other Virginia decisions illustrates its limited dimensions. (Pet. at 11-15).

It is settled that this Court does "not grant certiorari to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925). See also Texas v. Mead, 465 U.S. 1041 (1984) (Stevens, J.). Likewise, this Court does not sit simply to review procedures of state courts or to review mere state law questions. See Ross v. Moffitt, 417 U.S. 600, 616-617 (1974); Pulley v. Harris, 465 U.S. 37 (1984). See also U.S. S. Ct. R. 10.1 (writ "will be granted only when there are special and important reasons therefor."); Rule 14.1(h) (petitioner must demonstrate that federal question "was timely and properly raised so as to give this Court jurisdiction to review the judgment.")

Petitioner's argument fails these threshold requirements. Adjudication of this issue is simply a function of applying

Virginia's "bright line" rule to the record in this case. This Court's resources should be directed to other, more substantial issues.

II. Petitioner's Argument Attacking His Confession Lacks Merit And Thus Does Not Advance A Substantial Federal Constitutional Question.

On the merits, Mueller's attack upon the admissibility of his confession is far too insubstantial to justify review by this Court. It is important to note that Mueller does not challenge the adequacy of his Miranda warnings at the outset of his interrogation or the validity of his Miranda waiver. Also, petitioner raises no Sixth Amendment right to counsel issue; his arguments arise solely under the Fifth Amendment.

Finally, petitioner does not challenge the factual findings of the trial court and the Supreme Court of Virginia. While the admissibility of a confession is ultimately a legal question, the subsidiary factual findings are presumptively correct in this Court. See Miller v. Fenton, 474 U.S. 104 (1985). See also Sumner v. Mata, 449 U.S. 539 (1981); Roemer v. Maryland Public Works Bd., 426 U.S. 736, 758 (1976). The trial court found that petitioner was familiar with his Miranda rights and had previously invoked them, was advised of and understood his rights at the start of the interrogation, did not mean by his question to Garber to seek the assistance of counsel, and did not have his ability to exercise his free will to invoke his rights overborne. (App. 71-75). The State Supreme Court on direct appeal also found that petitioner's

statements during his interrogation about going to jail "were simply impatient gestures [rather than] an invocation of his right" to remain silent, that he was aware of the consequences of talking to the police, that his question to Garber was not a request for counsel, and that "Garber did not ... respond to Mueller's question by answering 'No.' Rather, he replied, while shrugging and shaking his head slightly from side to side, 'You're just talking to us.'" 244 Va. at 395-396, 422 S.E.2d at 386-387. Accordingly, the State Supreme Court held that petitioner never invoked his right to remain silent or right to counsel and that Garber's response to Mueller did not vitiate his earlier Miranda waiver. 244 Va. at 396-397, 422 S.E.2d at 387.

The record in this case reflects the correctness of these rulings. During the first two hours of petitioner's interrogation, he said several times that he was ready to go to jail. Mueller, however, had already been arrested and brought up the conditions of his pending incarceration several times (for example, whether he would be placed in a segregated cell). Significantly, about 75 minutes into the interview, Palfi asked if Mueller would be more comfortable talking with other officers. Petitioner responded that he did not mind talking to him and Garber. "I've been talking to you for four months. I've established a pretty good relationship with you guys." Cf. People v. Thompson, 50 Cal.3d 134, 266 Cal.Rptr. 309, 325 (1990). At no point after his references to being put in jail did petitioner stand up or in some other way clearly manifest his desire to end the questioning. This sharply

contrasted with his termination of two prior interviews in October, 1990 and refusal to take a polygraph test on February 7, 1991. (App. 188-191, 220, 237). See Smith v. Illinois, 469 U.S. 91, 98 (1984) (events prior to statement may render it ambiguous).

Moreover, numerous other courts have upheld confessions after the suspect had made comments much like Mueller's. See e.g., Delap v. Dugger, 890 F.2d 285, 292-293 (11th Cir. 1989), cert. denied, 110 S. Ct. 2628 (1990) (defendant asked several times how much longer he would be detained and stated "that he wanted to go"); United States v. D'Antoni, 856 F.2d 975, 980-981 (7th Cir. 1988) (defendant told police that he had provided all of the information he had); Moore v. Dugger, 856 F.2d 129, 134 (11th Cir. 1988) ("When will you all let me go home?"); Lightbourne v. Dugger, 829 F.2d 1012 (11th Cir. 1987), cert. denied, 488 U.S. 934 (1988) (defendant asked whether he had to continue with interrogation); United States v. Thierman, 678 F.2d 1331, 1335-1336 (9th Cir. 1982) ("Can we talk about it tomorrow?"). See also Fare v. Michael C., 442 U.S. 707, 724 (1979) (juvenile's request to speak with probation officer was not per se request to remain silent).

The record also establishes that petitioner did not invoke his right to counsel. First, petitioner effectively concedes that his question to Garber, standing alone, was insufficient to trigger his right to counsel. For example, Mueller repeatedly asserts that he was "contemplating" or "considering" a request for an attorney. (Pet. at 12-14). Further, he says that but for Garber's reply, he might have unambiguously sought counsel. Finally, Mueller states

that Garber could have remained silent when petitioner asked his question. (Pet. at 15). Beyond this, the state courts' unchallenged factual finding that Mueller's question was not a request for counsel necessarily resolves this issue. See also Connecticut v. Barrett, 479 U.S. 523, 528 (1987) (Miranda does not require police "to ignore the tenor or sense of a defendant's response" to warnings); Norman v. Ducharme, 871 F.2d 1483, 1486 (9th Cir.), cert. denied, 110 S. Ct. 1483 (1989); United States v. Pelton, 835 F.2d 1067, 1072 (4th Cir. 1987), cert. denied, 486 U.S. 1010 (1988).

Finally, petitioner's argument that Garber's response dissuaded him from clearly requesting counsel and vitiated the prior Miranda warnings is not well taken factually or legally. First, as the state courts found, Garber merely shrugged his shoulders and shook his head slightly from side to side, thus indicating that he could not answer Mueller's question. Because the officer did not give "an unambiguously negative reply," the Virginia Supreme Court rightly held that his response did not undercut the prior Miranda warnings. 244 Va. at 396, 422 S.E.2d at 387. See also Duckworth v. Eagan, 492 U.S. 195 (1989) (warnings in their totality satisfied Miranda; Court rejected petitioner's argument that phrase "if and when you go to court" misled him concerning the right to appointed counsel before questioning); California v. Prysock, 453 U.S. 355 (1981) (clarity of warnings conveyed to defendant his right to appointed counsel prior to questioning).

Further, Garber's fragmentary response could not possibly have confused Mueller as to the nature of his Miranda rights or the ramifications of making an inculpatory statement to the police. See generally Illinois v. Perkins, 110 S. Ct. 2394, 2397 (1990) (coercion determined from viewpoint of suspect). At the time of the confession, Mueller was 42 years old and had obtained a G.E.D. (App. 1281, 1287-1288). Petitioner had often been advised of his Miranda rights in connection with serious criminal charges and had either exercised or waived them. In the four months between Charity's disappearance and Mueller's arrest, the police informed him of his rights at least two times and he twice unambiguously stopped police interrogations. (App. 153, 184-185, 188-191, 253-257, 269-283).

At the outset of the post-arrest interrogation, Mueller was fully advised of his rights. Thereafter, prior to confessing, petitioner stated that he was concerned about being in jail, given the seriousness of the case. About 100 minutes into the interview, Palfi said in so many words: "Anything you tell us, we can get on the stand and tell the jury. You know that, or you should." Then, after Mueller confessed, he told the police that he had wanted "to get it off his chest." (App. 244).

It is therefore wholly untenable for Mueller to assert that Garber's statement misled him or caused him to confess. Given Mueller's background, his clear Miranda warnings at the start of his interrogation simply reinforced petitioner's understanding of his rights. See Colorado v. Spring, 479 U.S. 564, 577 (1987)

("broad and explicit" Miranda warnings conveyed to defendant nature of his "constitutional privilege and the consequences of abandoning it"). See also Patterson v. Illinois, 487 U.S. 285, 292-297 (1988) (defendant's Miranda warnings also served to apprise him of his Sixth Amendment right to counsel); Wyrick v. Fields, 459 U.S. 42, 47 (1982) ("circumstances [had not] changed so seriously" that defendant's waiver of counsel during polygraph test did not extend to post-test questioning). In sum, Mueller's knowledgeable background and explicit warnings at the start of the questioning overrode any arguable ambiguity in Garber's response. Cf. United States v. Cruz, 910 F.2d 1072, 1077-1079 (3rd Cir. 1990), cert. denied, 111 S. Ct. 709 (1991); United States v. Anglian, 784 F.2d 765, 768-769 (6th Cir.), cert. denied, 479 U.S. 841 (1986).

Finally, even if Garber's statement were deemed to contradict Mueller's Miranda warnings, the record in its entirety reflects that the statement did not induce his confession. See United States v. Pace, 898 F.2d 1218, 1246 (7th Cir.), cert. denied, 110 S. Ct. 3281 (1990) (even if police told defendant that his statements were "confidential" and that he was not a target of federal investigation, record established that such promises did not induce his statements). Cf. United States v. Bye, 919 F.2d 6 (2d Cir. 1990) (mere mention of possible benefits accruing from defendant's cooperation does not make statement involuntary).[3]

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[3]If the present petition is also deemed to argue that Mueller's confession was inadmissible under the Fifth Amendment's "totality of the circumstances" test, such a fact-specific claim is clearly an inadequate basis for this Court's review. Further, Mueller was a reasonably intelligent individual, who understood his rights and

III. Petitioner's Complaint Concerning The Adequacy Of The Voir Dire Does Not Raise A Substantial Federal Constitutional Issue.

Mueller complains that the voir dire was inadequate because he did not have the same latitude to ask whether anything would prohibit prospective jurors from giving a life sentence that the Commonwealth had in questioning veniremen whether anything would prohibit them from imposing the death penalty. Mueller further asserts that throughout the trial the judge and prosecutors asked leading questions which were "designed to box the jury in" and which did not effectively examine jurors concerning their fitness to serve in the penalty phase. (Pet. at 17).

First, the record establishes that petitioner may properly advance this argument only as to juror Max Zoeckler. The venire consisted of 47 persons. Twenty-three jurors were struck for cause. Petitioner objected to the trial court's qualification of ten of the remaining twenty-four veniremen. Mueller v. Commonwealth, 244 Va. at 399, 422 S.E.2d at 389. Petitioner challenged only two jurors, Ruby Moschler and Zoeckler, on the basis that they were "death prone." Id. Because the trial court did not refuse any question of Mueller's concerning Moschler's fitness to mete out a life sentence, the Supreme Court of Virginia found procedurally barred any attack upon the scope of her voir dire. 244 Va. at 399-400, 422 S.E.2d at 389. Thus, the adequacy

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had previously exhibited a willingness to exercise them. The officers observed no physical or mental impairment during petitioner's confession. (App. 240, 298). Thus, any such Fifth Amendment claim does not present a substantial federal constitutional question.

of the voir dire of Moschler or any other juror other than Zoeckler cannot warrant review by this Court. See Springfield v. Kibbe, 480 U.S. 257 (1987); Cardinale v. Louisiana, 394 U.S. 437 (1969). See also Coleman v. Thompson, 111 S. Ct. 2546 (1991).[4]

Petitioner's argument concerning the voir dire of Zoeckler breaks no new legal ground and hardly justifies this Court's review. Furthermore, his examination clearly comported with constitutional standards. First, the trial court made prefatory comments about the case and propounded questions about the jurors' possible bias or interest to groups of fourteen veniremen. (App. 383-416). See Rule 3A:14 of the Rules of the Supreme Court of Virginia. Then, the trial court questioned Zoeckler and other jurors individually concerning the extent, if any, of their exposure to pretrial publicity, ability to follow the principles of proof beyond a reasonable doubt and presumption of innocence, and ability to consider imposing either death or life imprisonment in the penalty phase. (App. 518-522). Then, each side was permitted to ask follow-up questions.

During Zoeckler's examination, the trial court sustained objections to two questions propounded by defense counsel concerning his possible "death-proneness." See Mueller v. Commonwealth, 244 Va. at 400, 422 S.E.2d at 389. The trial court's rulings were proper because Mueller's questions did not provide an

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[4]Similarly, Mueller's failure to object to the trial court's ruling that juror Theresa Gryder was qualified to sit on the jury bars any attack in this Court on her inclusion. See Mueller v. Commonwealth, 244 Va. at 402 n.4, 422 S.E.2d at 390-391.

adequate context for determining Zoeckler's fitness to serve in the penalty phase. That is, because the questions referred only to the nature of the aggravating evidence, and not the mitigating evidence, Zoeckler was forced to answer these questions in a vacuum. Further, these questions were offered "against the backdrop of the worst possible scenario ...." Pruett v. Commonwealth, 232 Va. 266, 281, 351 S.E.2d 1, 10 (1986), cert. denied, 482 U.S. 931 (1987). See also James Briley v. Bair, 750 F.2d 1238, 1247 (4th Cir. 1984), cert. denied, 470 U.S. 1088 (1985) ("[W]e attach little weight to [the juror's] attitude in an exaggerated hypothetical situation.").

Beyond this, the remainder of the voir dire amply explored Zoeckler's fitness to serve in the penalty phase. At the outset of his examination, the trial judge explained to him the nature of the bifurcated proceedings and the sentencing options of death and life imprisonment. (App. 519-520). Zoeckler twice said that he would "consider" life imprisonment if given this as a sentencing choice (App. 520-521). Then, during the prosecutor's examination Zoeckler answered affirmatively when asked whether he could consider both the death penalty and life imprisonment and whether he would not automatically vote to impose a death sentence upon a finding of guilt. (App. 523-524). After defense counsel questioned Zoeckler concerning his potential "death-proneness" in the penalty phase, the prosecutor concluded by asking him a series of questions aimed at determining his ability to weigh both sentencing options. (App. 537-540).

Consistent with Morgan v. Illinois, 112 S. Ct. 2222 (1992), the Supreme Court of Virginia correctly upheld the adequacy of this voir dire. 244 Va. at 400-402, 422 S.E.2d at 389-390. In Morgan, this Court held that the state trial court denied the defendant due process in a capital murder trial by refusing to ask prospective jurors whether they would "'automatically' vote to impose the death penalty no matter what the facts" were. 112 S. Ct. at 2226. This Court concluded that this question had been necessary in order to reasonably determine whether the jurors could fairly carry out their duty to consider both the aggravating and mitigating evidence in the penalty phase of the trial. Because the voir dire did not make it clear that the jury was impartial, this Court reversed Morgan's conviction. 112 S. Ct. at 2235.

No such doubt exists in the present case. Zoeckler, like the other veniremen, was specifically questioned at length concerning his ability to consider both sentencing options if the case reached the sentencing stage. Particularly considering this Court's reaffirmation in Morgan that the Constitution "does not dictate a catechism for voir dire" and that due process requires only those questions which are not just helpful but necessary to the fairness of a trial, 112 S. Ct. at 2230, the voir dire in the case at bar passed constitutional muster. See also Mu'Min v. Virginia, 111 S. Ct. 1899 (1991).

CONCLUSION

For the foregoing reasons, certiorari should not be granted in

this case. Petitioner raises little more than state law arguments; the scope of any constitutional argument is extremely narrow. Moreover, petitioner points to no issue the disposition of which would materially aid other courts. Likewise, Mueller has not demonstrated that the trial court's rulings were incorrect. Thus, he has not shown any substantial federal constitutional question on any of the issues he advances. Accordingly, respondent prays that this Court deny the petition for certiorari.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of March, 1993, a copy of this Brief in Opposition To Petition For a Writ of Certiorari was mailed to Everett Lee Mueller, No. 190275, Mecklenburg Correctional Center, P. O. Box 500, Boydton, Virginia 23917, petitioner pro se.

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March 8, 1993

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SUPREME COURT, U.S.

The Honorable William K. Suter, Clerk
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

Re: Everett Lee Mueller v. Commonwealth of Virginia
No. 92-7507

Dear Mr. Suter:

Enclosed please find a Brief In Opposition To Petition For A Writ Of Certiorari to be filed on behalf of respondent in the above-styled matter.

Thank you very much for your assistance in this matter.

Sincerely,

Robert H. Anderson III
Robert H. Anderson, III
Assistant Attorney General

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